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Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations

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Summary

When issuing regulations that have the full force and effect of law, agencies are required to follow certain procedures. The Administrative Procedure Act (APA) of 1946 set up the basic framework for rulemaking: agencies are required to publish a notice of rulemaking in the *Federal Register*, take comments on the proposed rule, and publish a final rule in the *Federal Register*. Since the passage of the APA, additional procedures have been established in various statutes, executive orders, and guidance documents.

One potential change to the rulemaking process that has been discussed over the past three decades and proposed in legislation in the 112th Congress is the extension of the requirements of Executive Order (E.O.) 12866 to the independent regulatory agencies, also known as independent regulatory commissions (hereafter referred to as IRCs). E.O. 12866 contains two major requirements: first, it requires that agencies complete cost-benefit analysis (CBA) of "economically significant" rules, considering the potential costs, benefits, and feasible alternatives to proposed and final rules. Second, the order requires centralized review of "significant" rules in the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA). Historically, the IRCs have been exempted from requirements for CBA and centralized review. Senator Rob Portman introduced a bill in the 112th Congress, S. 3468, that would authorize the President to extend to the IRCs, by executive order, E.O. 12866's requirements for CBA and OIRA review. If the requirements of E.O. 12866 were extended to the IRCs, there could be significant implications for those agencies.

Potential Extension of CBA Requirements. Proponents of extending the requirements argue that subjecting the IRCs to CBA requirements and OIRA review could improve the quality of regulations issued by those agencies. On the other hand, extending CBA requirements and OIRA review to the IRCs could grant OIRA (and by extension, the President) the potential authority to influence or delay rulemaking proceedings, and such a requirement could potentially decrease the independence of the IRCs. The IRCs with fewer regulatory responsibilities that issue relatively fewer "significant" rules each year may find the additional requirements of S. 3468 minimally burdensome, even if their current cost-benefit practices are not as rigorous as what would be required under E.O. 12866. Conversely, the IRCs with greater regulatory responsibilities or the IRCs with recently expanded regulatory responsibilities may find the additional CBA requirements more burdensome. It is also possible that some IRCs may not have the staff with the technical expertise necessary to conduct cost-benefit analysis that is more extensive than their current requirements.

Potential Extension of OIRA Review. The second major element of E.O. 12866 is OIRA review of "significant" regulations. During the review process, OIRA examines each regulation to ensure that the agency followed the principles and procedures outlined in E.O. 12866, including the applicable requirements for conducting CBA, and that the regulation is consistent with the policy preferences of the President. Numerous individuals, including former OIRA officials and several administrative law scholars, have spoken in support of potential OIRA review of regulations issued by IRCs. Much of this support for OIRA review relies on the underlying premise that increased presidential control, through OIRA review, of rulemaking could improve both the rulemaking process within agencies and the quality of the regulations themselves. On the other hand, some have expressed hesitation or opposition to the extension of OIRA review to the IRCs, suggesting that the independence of the IRCs could be compromised and that OIRA review of IRCs' rules could lead to delay.

Contents

Tables

Contacts

When Congress enacts a statute, it often delegates rulemaking authority to federal agencies to implement the statute. When issuing regulations, agencies are required to follow certain procedures. The first and arguably most significant requirements of the rulemaking process were established by the Administrative Procedure Act (APA) of 1946.[1] The APA set up the basic framework for rulemaking: agencies are required to publish a notice of rulemaking in the *Federal Register*, take comments on the proposed rule, and publish a final rule in the *Federal Register*.[2] Since the passage of the APA, additional procedures have been established in various statutes, executive orders, and guidance documents. Potential additional changes to the rulemaking process have been discussed and proposed, including many proposals in the 112th Congress.

This report discusses one potential change to the rulemaking process that has been discussed over the past three decades and proposed in legislation in the 112th Congress: extension of the requirements of Executive Order (E.O.) 12866 to the independent regulatory agencies, also known as independent regulatory commissions (hereafter referred to as IRCs).[3] E.O. 12866 contains two major requirements: First, it requires that agencies complete cost-benefit analysis (CBA) of "economically significant" rules, considering the potential costs, benefits, and feasible alternatives to proposed and final rules. Second, the order requires centralized review of "significant" rules in the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA). Historically, the IRCs have been exempted from requirements for CBA and centralized review. Senator Rob Portman introduced a bill in the 112th Congress, S. 3468, which would authorize the President to extend to the IRCs, through the issuance of an executive order, E.O. 12866's requirements for CBA and OIRA review.[4]

If the requirements of E.O. 12866 were extended to the IRCs, there could be significant implications for those agencies. Proponents of extending the requirements argue that subjecting the IRCs to CBA requirements and OIRA review could improve the quality of regulations issued by those agencies. On the other hand, extending CBA requirements and OIRA review to the IRCs could grant OIRA (and by extension, the President) the potential authority to influence or delay rulemaking proceedings, and such a requirement could potentially decrease the independence of the IRCs.

This report begins with a brief overview of E.O. 12866 and the IRCs. The report then provides a detailed discussion of the two major requirements of the order and analyzes the potential changes to the order that have been proposed in the 112th Congress.[5]

Executive Order 12866 and the IRCs

President William Clinton issued E.O. 12866 in 1993. The executive order, which still remains in place today, replaced E.O. 12291, which was issued by President Ronald Reagan in 1981.[6] E.O.

[1] 5 U.S.C. §551 *et seq.* For more information about rulemaking generally, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[2] The APA specifically authorizes federal agencies to dispense with its requirements for notice and comment if the agency for good cause finds that the use of traditional procedures would be "impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. §553(b)(B)).

[3] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

[4] S. 3468 (112th Congress), introduced by Senator Rob Portman on August 1, 2012.

[5] This report does not provide any legal analysis of the possible extension of cost-benefit analysis or OIRA review of regulations to the IRCs. For an overview of the legal issues involved, see CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by Vivian S. Chu and Daniel T. Shedd.

[6] For more information about these orders, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of*

12291 had similar requirements for agencies to conduct CBA and send their rules to OIRA for review, but its requirement for centralized review applied to *all* rules, not just "significant" rules.

The parts of E.O. 12866 that require agencies to complete CBA and to submit their rules to OIRA for review do not currently apply to statutorily designated "independent regulatory agencies," nor did they under President Reagan's order.[7] The details of these two requirements are discussed more below (see sections entitled "Cost-Benefit Analysis Requirements Under Executive Order 12866" and "OIRA Review of Regulations Under Executive Order 12866"). The exemption of IRCs from various requirements provides them with an element of independence from presidential control.[8]

E.O. 12866 uses the definition of an independent regulatory agency established in 1980 by the Paperwork Reduction Act (PRA; 44 U.S.C. §3502(5)).[9] The independent regulatory agencies listed are as follows:

> The Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission.[10]

The current exemption for the IRCs from presidential review of agency rulemaking is one of the indicia of agency independence. Other elements of independence that provide various degrees of insulation from presidential intrusion into the budgetary, regulatory, and litigation processes are (1) "for cause" removal protections for the agency heads; (2) structural designs; (3) exemptions from OMB clearance requirements for legislative proposals, testimony, and comments; (4)

Information and Regulatory Affairs, coordinated by Maeve P. Carey.

[7] Certain parts of E.O. 12866 *do* apply to IRCs—such as the requirements that each agency (1) "prepare an agenda of all regulations under development or review" and (2) "prepare a Regulatory Plan … of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter" (§4(b), the Unified Regulatory Agenda; §4(c), the Regulatory Plan).

[8] Commenters at an April 2011 Resources for the Future conference stated that both President Reagan and President Clinton obtained legal opinions from the Office of Legal Counsel at the Department of Justice stating that Executive Orders 12291 and 12866 could cover IRCs. However, the decision not to cover them was reportedly a political, not a legal, determination. See Sally Katzen, "Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions?" Opening Remarks, Washington, D.C., April 7, 2011, http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf, pp. 2-3.

[9] This list has been amended since 1980, most recently by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, hereafter the Dodd-Frank Act). The agencies listed in this section of the *U.S. Code* have special procedures for OMB review of their information collection requests under the PRA. For more information, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows.

[10] The United States International Trade Commission is one of the "other similar agenc[ies] designated by statute as a Federal independent regulatory agency" although it is not specifically listed in that provision of the *U.S. Code*. See 19 U.S.C. §1330(f) (stating that the United States International Trade Commission "shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44, United States Code").

authority to bypass OMB when submitting the agency's budget, or to submit the agency's budget to OMB and Congress concurrently; and (5) independent litigation authority.[11]

The remainder of this report discusses the two main requirements of E.O. 12866 in greater detail and analyzes the possible implications of extending those requirements to the IRCs.

Cost-Benefit Analysis Requirements Under Executive Order 12866

The primary cross-cutting requirement for agencies to consider costs and benefits when issuing rules is found in E.O. 12866, which requires agencies to assess costs and benefits for "significant" rules, both at the proposed rule and final rule stage.[12] "Significant" rules are defined in the executive order as follows:

> Any regulatory action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.[13]

Rules falling into the first category of this definition are considered "economically significant" rules. When issuing "economically significant" rules, Section 6(a) of E.O. 12866 requires agencies to perform a much more detailed CBA, assessing the costs, benefits, and "reasonably feasible alternatives" to the planned rule.

Other provisions of E.O. 12866 also make reference to the consideration of costs and benefits during the rulemaking process for all rules, not just "significant" rules. Section 1(b)(5) requires an agency to "design its regulations in the most cost-effective manner to achieve the regulatory objective" and to "consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity." Section 1(b)(6) requires agencies to "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Finally, Section 1(b)(11) requires agencies to "tailor [their] regulations to impose the least burden on society," while "obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."

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[11] For an in-depth discussion of characteristics of IRCs, see CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by Vivian S. Chu and Daniel T. Shedd, pp. 3-5; Marshall J. Breger and Gary J. Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52, no. 4 (Fall 2000), pp. 1144-1145; and *Duke Law Journal's* "Symposium: The Independence of Independent Agencies," vol. 137, no. 2&3 (April/June), pp. 215-299.

[12] For more information about other cost-benefit analysis requirements, see CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, by Maeve P. Carey.

[13] The definition of "significant" rules in S. 3468 differs slightly from the definition in E.O. 12866. See section below entitled "Additional Analysis of S. 3468."

OMB Circular A-4

In September 2003, OMB finalized Circular A-4 on "Regulatory Analysis," which refined and replaced an earlier OMB guidance document providing good-guidance practices to agencies for conducting their CBAs.[14] The circular states that it was "designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported." The document provides some specific information that agencies should generally include in their analyses, such as the statutory or judicial directives that authorize the action; the underlying problem or market failure prompting the regulation; consideration of a "reasonable number" of regulatory alternatives; and both a cost-benefit analysis and a cost-effectiveness analysis. Circular A-4 remains the current OMB guidance for agencies preparing CBAs.

Executive Orders 13563 and 13579

In January 2011, President Barack Obama issued E.O. 13563 to supplement and re-emphasize the general requirements of E.O. 12866.[15] E.O. 13563, like E.O. 12866, stressed the importance of cost-benefit considerations in the rulemaking process. Specifically, Section 1(b)(2) of E.O. 13563 encouraged agencies to "tailor [their] regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations"; and to "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)." E.O. 13563 also instituted a retrospective review of regulations, under which agencies were required to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

E.O. 13563 used the same definition of "agency" as E.O. 12866, thereby excluding the IRCs. However, on July 14, 2011, President Obama issued E.O. 13579, entitled "Regulation and Independent Regulatory Agencies."[16] In that order, President Obama encouraged the IRCs to voluntarily comply with the provisions of E.O. 13563, including the retrospective reviews of regulations as well as other general considerations, including "economic growth, innovation, competitiveness, and job creation."

Cost-Benefit Analysis by the IRCs: Current Requirements and Practices

The IRCs are exempt from many of the analytical requirements and guidance documents that are applicable to executive agencies, including E.O. 12866, E.O. 13563, and OMB Circular A-4. However, the IRCs may be required to conduct CBA or other regulatory analyses under cross-cutting statutes, such as the Regulatory Flexibility Act of 1980 (RFA), or under the underlying

[14] OMB Circular A-4, "Regulatory Analysis," September 17, 2003, http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/a-4.pdf. The circular took effect for "economically significant" proposed rules on January 1, 2004, and for "economically significant" final rules on January 1, 2005.

[15] Executive Order 13563, "Improving Regulations and Regulatory Review," 76 *Federal Register* 3821, January 21, 2011.

[16] Executive Order 13579, "Regulation and Independent Regulatory Agencies," 76 *Federal Register* 41587, July 14, 2011.

statutes that provide them with rulemaking authority. In addition, the IRCs may conduct CBA or similar analyses as part of their internal rulemaking process, even if they are not statutorily or otherwise required to do so.

The following section summarizes select statutory provisions that require the IRCs to analyze the potential effects of their rules. This section covers nine IRCs: the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve, the Nuclear Regulatory Commission (NRC), the National Labor Relations Board (NLRB), and the Consumer Product Safety Commission (CPSC).[17]

Cross-Cutting Analytical Requirements

The following statutes contain analytical requirements that apply to all agencies of the federal government, including the IRCs:

- the National Environmental Policy Act (NEPA) of 1969 requires federal agencies to provide a detailed environmental impact statement for all major federal actions that will significantly affect the quality of the human environment;[18]
- the RFA requires all federal agencies to assess the impact of their proposed regulations on "small entities" (e.g., small businesses, small governmental jurisdictions, and certain small not-for-profit organizations) and conduct a "regulatory flexibility analysis" at the time certain proposed and final rules are issued;[19] and
- the PRA requires all federal agencies to assess and minimize the paperwork burden for individuals, small businesses, and others resulting from the collection of information (from 10 or more nonfederal persons) by or for the federal government.[20]

Agency-Specific Analytical Requirements

Additionally, the IRCs may be subject to analytical requirements contained within the underlying statutes that provide them with rulemaking authority. This section provides select examples of statutory agency-specific requirements.[21]

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[17] Together, these nine IRCs issued 57 major rules (e.g., rules having a $100 million impact on the economy) in FY2010, FY2011, and FY2012. The Federal Trade Commission issued one major rule jointly with the Board of Governors of the Federal Reserve. The remaining nine IRCs listed in the PRA did not issue any major rules during that period.

[18] 42 U.S.C. §§4321-4347. The "trigger" for the analytical requirements contained in the NEPA has been challenged and defined in court. For additional information, see CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, by Maeve P. Carey, and CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander.

[19] 5 U.S.C. §§601-612.

[20] 44 U.S.C. §§3501-3520.

[21] Statutes that provide the IRCs with rulemaking authority were identified by reviewing a sample of the rules issued by each IRC and by reviewing information on regulations and rulemaking procedures contained on each IRCs website. Statutory provisions that require the IRCs to analyze the potential effects of their rules were identified by searching those statutes for variants of the terms "rulemaking," "regulation," and variants of the phrases "cost-benefit analysis" and "consider costs and/or benefits." In some cases where the IRC is provided with rulemaking authority under

Securities and Exchange Commission. The Securities Exchange Act of 1934 (15 U.S.C. §§78a *et seq*.), the National Securities Markets Improvement Act of 1996 (P.L. 104-290; 11 Stat. 3416), and the Investment Company Act of 1940 (15 U.S.C. §§80a-1 *et seq*.) each provide the SEC with authority to promulgate rules, and each has provisions requiring the SEC to consider whether a proposed regulatory action will "promote efficiency, competition, and capital formation."[22]

The Securities Exchange Act states that

> The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.[23]

The National Securities Markets Improvement Act of 1996 requires the SEC to consider whether an action "will promote efficiency, competition, and capital formation" whenever it is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest."[24] Under the Investment Company Act of 1940, when engaging in rulemaking pursuant to the act, the SEC is required to consider (1) "whether an action is consistent with the public interest"; (2) "the protection of investors"; and (3) "whether the action will promote efficiency, competition, and capital formation."[25]

In 2011, in *Business Roundtable v. SEC*, the D.C. Circuit vacated an SEC rule that would have required public companies to disclose information to shareholders regarding shareholder-nominated candidates for board of director positions. The court noted that the SEC has an obligation to "determine as best it can the economic implications of the rule" and ultimately vacated the rule, finding the SEC's action arbitrary and capricious under the Administrative Procedure Act (5 U.S.C. §§551 *et seq*.).[26]

Commodity Futures Trading Commission. The Commodity Exchange Act (7 U.S.C. §§1 *et seq*.) provides the CFTC with rulemaking authority and requires the CFTC to consider costs and benefits before issuing certain regulations. Section 15(a) of the act states the following:

> Before promulgating a regulation under this chapter ... the Commission shall consider the costs and benefits of the action of the Commission. The costs and benefits of the proposed Commission action shall be evaluated in light of - (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations.[27]

multiple statutes, a sample of statutes identified was examined.

[22] See, for example, 15 U.S.C. §77b(b).

[23] 15 U.S.C. §78w(a)(2).

[24] 15 U.S.C. §77b(b).

[25] 15 U.S.C. §80a-2(c).

[26] *Business Roundtable v. SEC*, 647 F.3rd 1144 (D.C. Cir. 2011).

[27] 7 U.S.C. §19(a). Subsection (a)(3) states that these requirements do not apply to "(A) An order that initiates, is part

Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, hereafter the Dodd-Frank Act) amended certain provisions of the Commodity Exchange Act and expanded the rulemaking responsibilities of the CFTC. According to the CFTC Office of the Inspector General, in light of its existing analytical requirements, the CFTC Office of General Counsel and Office of Chief Economist created a template for cost-benefit analysis processes that should be followed when proposing rules under the Dodd-Frank Act. The template requires the CFTC to consider, but not monetize or quantify, costs and benefits. The template also allows the CFTC to use discretion to determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest.[28]

Consumer Financial Protection Bureau. Title X of the Dodd-Frank Act created the CFPB and provided it with the authority to "administer, enforce, and otherwise implement the provisions of Federal consumer financial law."[29] The act also established certain standards of rulemaking that the CFPB must adhere to when issuing rules. Specifically, the Dodd-Frank Act states that

> the Bureau shall consider - (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas.

Therefore, it appears that the CFPB is required to consider potential costs and benefits before issuing certain rules, but it is unclear how much detail would be required in the analysis.

Federal Deposit Insurance Corporation. The FDIC has rulemaking authority under Section 209 of the Dodd-Frank Act. While some provisions of the Dodd-Frank Act require consideration of certain benefits and costs, it does not appear that the FDIC would be required to conduct such analyses under its rulemaking authority.[30]

The FDIC is also provided rulemaking authority by the Riegle Community Development and Regulatory Improvement Act (Riegle Community Act, P.L. 103-325; 108 Stat. 2160). The Riegle Community Act requires federal banking agencies, including the FDIC, to consider the burden and benefits their regulations will have on depository institutions. A report prepared by the FDIC Office of the Inspector General noted that Section 302 of the Riegle Community Act states,

> In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest - (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.[31]

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of, or is the result of an adjudicatory or investigative process of the Commission, (B) an emergency action, or (C) a finding of fact regarding compliance with a requirement of the Commission."

[28] Office of the Inspector General, U.S. Commodity Futures Trading Commission, "A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act," June 13, 2011, http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf.

[29] 12 U.S.C. §5512(a).

[30] See, e.g., 12 U.S.C. §5551(c)(2) and 12 U.S.C. §5512(b)(2)(A).

[31] Office of the Inspector General, Federal Deposit Insurance Corporation, "Evaluation of the FDIC's Economic Analysis of Three Rulemakings to Implement Provisions of the Dodd-Frank Act," June 13, 2011, p. 12, http://www.fdicig.gov/reports11/11-003EV.pdf.

Therefore, it appears that the FDIC is required to consider the potential benefits and administrative burden prior to issuing certain rules. However, based on the language of this statutory provision, the level of detail that would be required in the analysis is not clear.

Office of the Comptroller of the Currency. Section 315 of the Dodd-Frank Act amended the PRA and designated the OCC as an IRC. Previously, the OCC had been part of the Department of the Treasury, and therefore was subject to E.O. 12866 and OMB Circular A-4. As a listed IRC, the OCC is no longer subject to those requirements. As a federal banking agency (as designated by 12 U.S.C. §1813), however, the OCC is subject to the same analytical requirements of the Riegle Community Act as the FDIC.

Board of Governors of the Federal Reserve System. The Board of Governors of the Federal Reserve System (hereafter referred to as the Board) has rulemaking authority under multiple statutes, including the Federal Reserve Act (12 U.S.C. §§221 *et seq.*) and the Bank Holding Company Act of 1956 (12 U.S.C. §§1841 *et seq.*). According to the Office of Inspector General for the Board, statutes related to the Board's rulemaking authority "generally do not require economic analysis as part of the agency's rulemaking activities."[32] However, as a federal banking agency, the Board is subject to the same analytical requirements of the Riegle Community Act as the FDIC and the OCC.[33]

Nuclear Regulatory Commission. The NRC is provided rulemaking authority under the Atomic Energy Act of 1954 (42 U.S.C. §§2201 *et seq*.) as well as the Energy Reorganization Act of 1974 (42 U.S.C. §5841). The Atomic Energy Act, as amended, provides the NRC with the authority to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property."[34] According to an NRC issue paper, "courts have interpreted the AEA to mean that costs must not be considered by the NRC when it determines that a given regulatory action is necessary for adequate protection."[35]

However, the act also provides the NRC with the authority to adopt regulations that go beyond "adequate" protection and the NRC's internal rulemaking procedures permit more extensive CBA of those rules.[36] For example, the NRC is subject to regulatory analysis requirements under the "backfit rule," which establishes procedures for the development of modifications to power reactors and/or selected nuclear materials facilities that are licensed by the NRC.[37] Under the backfit rule, the NRC must perform detailed cost-benefit analysis of all proposed modifications to

[32] Office of the Inspector General, Board of Governors of the Federal Reserve System, "Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings," June 13, 2011, p. 6, http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.

[33] The Board also has rulemaking authority under two provisions of the Electronic Funds Transfer Act (EFT Act, 15 U.S.C. §1693b), which was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203; 124 Stat. 1376, hereafter the Dodd-Frank Act).

[34] 42 U.S.C. §2201(b).

[35] R.W. Borchardt, Executive Director for Operations, Nuclear Regulatory Commission, "Consideration of Economic Consequences within the U.S. Nuclear Regulatory Commission's Regulatory Framework," August 14, 2012, enclosure 3, p.1, http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2012/2012-0110scy.pdf.

[36] 42 U.S.C. §2232(a).

[37] 10 C.F.R. §50.109.

nuclear facilities that go beyond "adequate" protection and provide a "substantial increase in the overall protection of public health and safety."[38]

It appears that the NRC must adopt the regulations it determines are necessary to adequately protect the public from the risks posed by the materials and facilities it is regulating, notwithstanding the cost. However, it seems that the NRC also conducts more extensive CBA of regulations that go beyond "adequate" protection; and according to the NRC's FY2011 Regulatory Plan, the NRC "routinely conducts comprehensive regulatory analyses that examine the costs and benefits of contemplated regulations" based on "internal procedures and programs to ensure that it imposes only necessary requirements on its licensees."[39]

National Labor Relations Board. Generally, NLRB rules are promulgated under the authority in Section 6 of the National Labor Relations Act (29 U.S.C. §156), which does not mention a requirement to conduct cost-benefit analysis as part of the NLRB rulemaking process. A preliminary examination of NLRB rules submitted to GAO over the past year found that only one was considered a "major" rule.[40] For this rule, the NLRB estimated costs but not benefits.[41]

Consumer Product Safety Commission. The CPSC is provided rulemaking authority under at least nine statutes, including the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), the Child Safety Protection Act (CSPA), and the Poison Prevention Packaging Act (PPPA).[42] These statutes contain varying degrees of requirements for CBA and other regulatory analyses. For example, the CPSA requires the CPSC to conduct a preliminary regulatory analysis prior to publication of a proposed rule, which must be published in the *Federal Register* with the proposed rule. The regulatory analysis must contain, in part,

> a preliminary description of the potential benefits and potential costs of the proposed rule, including any benefits or costs that cannot be quantified in monetary terms and.... a description of any reasonable alternatives to the proposed rule, together with a summary description of their potential costs and benefits.[43]

In contrast, the PPPA states that the CPSC should consider the "reasonableness" of packaging standards of specified household substances, but it specifically states the CPSC is *not* required to conduct cost benefit analysis. "Nothing in this Act shall be construed to require the Consumer Product Safety Commission, in establishing a standard under this section, to prepare a comparison of the costs that would be incurred in complying with such standard with the benefits of such standard."[44]

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[38] R.W. Borchardt, Executive Director for Operations, Nuclear Regulatory Commission, "Consideration of Economic Consequences within the U.S. Nuclear Regulatory Commission's Regulatory Framework," August 14, 2012, p.4, http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2012/2012-0110scy.pdf.

[39] U.S. Nuclear Regulatory Commission, *Fiscal Year 2011 Regulatory Plan Statement of Regulatory Priorities*, January 20, 2012, http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201110/Statement_3150.html.

[40] See National Labor Relations Board, "Notification of Employee Rights Under the National Labor Relations Act," 76 *Federal Register* 54006, August 30, 2011.

[41] U.S. Government Accountability Office, *National Labor Relations Board: Notification of Employee Rights Under the National Labor Relations Act*, GAO-11-951R, September 20, 2011, http://gao.gov/products/GAO-11-951R.

[42] See Consumer Product Safety Act, as amended (P.L. 92-573; 15 U.S.C. §§2051-2089); Federal Hazardous Substances Act, as amended (P.L. 86-613; 15 U.S.C. §§1261-1278); Child Safety Protection Act (P.L. 103-267); and the Poison Prevention Packaging Act (P.L. 91-601; 15 U.S.C. §1471 et seq.). The CPSC maintains a list of the statutes that provide them with regulatory authority. The list may be found at http://www.cpsc.gov/businfo/actreg.html.

[43] 15 U.S.C. §2058(c).

[44] 15 U.S.C. §1472(e).

In sum, the IRCs may be required to conduct some form of CBA or other regulatory analyses of certain rules under cross-cutting statutes or the underlying statutes that provide them with rulemaking authority. In some cases, the analysis required may be less rigorous or less detailed than that which would be required under E.O. 12866 and Circular A-4. The IRCs may also conduct CBA or similar analyses as part of their internal rulemaking process, even if they are not statutorily or otherwise required to do so. Finally, the IRCs may be exempted or statutorily prohibited from conducting CBA as part of their rulemaking process.

Table 1 summarizes the cost-benefit analyses of "major" rules[45] that were conducted by selected IRCs in FY2010, FY2011, and FY2012. In some cases, the IRCs "monetized" or in other ways quantified costs, benefits, or both. According to an OMB report, however, the IRCs are more likely to discuss and consider costs and benefits without monetizing or quantifying them.[46]

Table 1. Cost-Benefit Analysis of "Major" Rules Issued by Selected IRCs: FY2010 to FY2012

Agency	"Major" Rules Issued	Monetized Costs and Benefits	Monetized Costs Only	Provided Some Information on Costs or Benefits
Securities and Exchange Commission	25	0	14	24
Commodity Futures Trading Commission	15	0	5	12
Consumer Financial Protection Bureau	1	0	0	1
Federal Deposit Insurance Corporation	2	0	1	1
Office of the Comptroller of the Currency[a]	3	0	2	2
Board of Governors of the Federal Reserve	12	0	2	2
Nuclear Regulatory Commission	3	0	3	3
National Labor Relations Board[b]	1	0	1	1

[45] The definition of "major" rule is slightly different than that of "economically significant" rule. Under the Congressional Review Act, a rule is "major" if it is likely to result in "(A) an annual effect on the economy of $100 million or more; (B) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets" (5 U.S.C. §804(2)). In contrast, the definition of "economically significant" is found in E.O. 12866. OIRA maintains information on the number of *reviews* conducted each year of "significant" and "economically significant" rules, but does not keep data on the number of those types of *rules* issued each year. The information in **Table 1** was obtained largely from the GAO Federal Rules Database, which contains reports on all "major" rules issued annually by agencies, including the IRCs.

[46] See Office of Management and Budget, Office of Information and Regulatory Affairs, *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* and *Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress.

Agency	"Major" Rules Issued	Monetized Costs and Benefits	Monetized Costs Only	Provided Some Information on Costs or Benefits
Consumer Product Safety Commission[c]	2	0	2	2
Total[d]	**57**	**0**	**26**	**43**

Source: Office of Management and Budget, 2011 and Draft 2012 Reports to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, Appendix C. The OMB reports contained information for FY2010 and FY2011. Additional information for FY2010, FY2011, and FY2012 was obtained from the U.S. Government Accountability Office Federal Rules Database, http://gao.gov/legal/congressact/fedrule.html, and from the Federal Register. In select cases, the reports from OMB and GAO differed in their assessment of the CBA conducted by the IRCs. When necessary, the rule published in the Federal Register was consulted to resolve differences in the two reports.

Notes: Searches of the GAO Federal Rules database and the *Federal Register* were conducted on October 15, 2012.

a. OMB did not provide information on the OCC. However, according to the GAO Federal Rules Database, the OCC submitted three "major" rules to GAO. The first rule was issued jointly with the FDIC and the FRS, and was published in the *Federal Register* on January 28, 2010, prior to the enactment of the Dodd-Frank Act (75 F.R. 4636). At that time, the OCC was subject to the CBA requirements of E.O. 12866. The second rule was published in the *Federal Register* on July 28, 2010, one week after the enactment of the Dodd-Frank Act (75 F.R. 44656). The third rule was issued jointly with the FDIC and the FRS, and was published in the *Federal Register* on August 30, 2012 (77 F.R. 53060). According to the GAO rule reports, the OCC did not conduct CBA for the first rule. For the last two rules, the OCC conducted CBA and monetized costs but not benefits.

b. OMB did not provide information on the NLRB. However, according to the GAO Federal Rules Database, the NLRB submitted one "major" final rule to GAO on August 30, 2011 (76 F.R. 54006). The GAO report for this rule states that the NLRB described both costs and benefits, but only monetized cost.

c. According to the GAO reports, the CPSC did not conduct cost-benefit analysis of its two "major" rules. According to the *Federal Register*, however, the CPSC did conduct regulatory flexibility analyses, including monetization of potential costs to small entities.

d. A total of 57 individual "major" rules were issued in FY2010, FY2011, and FY2012. Some of these rules were issued jointly by two or more IRCs. Consequently, the sum of the each column may be greater than the totals that are listed in the table.

In FY2010, FY2011, and FY2012, a total of 57 "major" rules were promulgated by the nine IRCs included in this analysis. Of those, 43 "major" rules contained some information on benefits or costs, though only 26 included monetized estimates of costs. None of the "major" rules included monetized estimates of benefits.

- The SEC issued 25 "major" rules, more than any other IRC. The SEC provided information on costs and benefits for all but one rule. Fourteen of the 25 rules promulgated by the SEC monetized costs but not benefits.
- The CFTC promulgated 15 "major" rules. The CFTC monetized costs for five of their "major" rules, and provided some information on costs and benefits for 12 rules.
- The Board of Governors of the Federal Reserve promulgated 12 rules, two of which monetized costs.[47]

[47] While the Federal Reserve appears rarely to conduct cost-benefit analysis as part of its rulemaking process, it is important to note that many of its rules involved monetary policy, which may be exempt from analytical requirements under S. 3468, which is discussed more in detail later in this report.

- The remaining IRCs each issued fewer than five "major" rules. The OCC and NRC each issued three "major" rules. The NRC monetized costs for each of its rules, while the OCC monetized costs for two rules.
- The CFPB and NLRB each issued one "major" rule. The NRLB rule monetized costs. The CFPB did not monetize costs, but did include some information on costs and benefits.

There are several possible reasons why the cost-benefit analysis currently conducted by IRCs may not be as rigorous as the full analytical requirements contained in E.O. 12866 and Circular A-4. First, the statutory provisions that require the IRCs to conduct cost-benefit analysis vary in scope, and the analysis they require may be less rigorous than that which would be required under E.O. 12866. As shown previously, some agency-specific statutes require cost-benefit analysis, including monetized or quantified estimates of costs and benefits whenever possible. Others require consideration of potential costs and benefits, but do not require quantified or monetized estimates. Others require little or no analysis at all.[48]

In addition, the internal rulemaking practices of each IRC vary in scope. Some may require or encourage staff to follow the cost-benefit procedures in Circular A-4. Other IRCs may integrate some, but not all, of OMB's guidance into their internal rulemaking procedures.

Generally, the nature of the rules being promulgated by the IRCs may make it difficult to conduct rigorous, quantitative, cost-benefit analysis. Some rules, for example, may involve costs and/or benefits that are more difficult for the agency to quantify or monetize. In such cases, E.O. 12866 and Circular A-4 instruct covered agencies to conduct cost-effectiveness analysis (CEA), which involves qualitative discussion of costs and benefits, as opposed to the more rigorous cost-benefit analysis, which typically requires monetized estimates of both costs and benefits.

Finally, the resources and capacity to conduct cost-benefit analysis may vary from agency to agency. For example, concerns have been raised over whether agencies have a sufficient number of staff who are qualified to perform extensive, quantitative cost-benefit analysis.[49] This, in turn, may be impacted by the number of rules promulgated by the agency each year; particularly those rules that are subject to cross-cutting or statutory analytical requirements. As shown in **Table 1**, the number of "major" rules promulgated each year varies from agency to agency. The SEC, which issued highest number of rules between FY2010 and FY2012, created the Division of Risk, Strategy, and Financial Innovation (Risk Fin) in 2009 to enhance its capability to conduct economic analysis as part of their rulemaking process. However, comparatively smaller agencies

[48] It is important to note that while the statutory requirements applicable to the IRCs may be less rigorous, they frequently apply to all of the rules proposed or issued, whereas the most rigorous analytical requirements of E.O. 12866 and Circular A-4 apply only to "economically significant" rules. For example, the internal regulatory analysis guidance issued by the NRC notes, "the NRC requires regulatory analyses for a broader range of regulatory actions than for significant rulemakings as defined in E.O. 12866" and, with certain exceptions, NRC's analytical requirements apply to "rules, bulletins, generic letters, regulatory guides, orders, standard review plans, branch technical positions, and standard technical specifications." Nuclear Regulatory Commission, *Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission*, NUREG/BR-0058 Revision 4, September, 2004, p. 10, http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0058/br0058r4.pdf.

[49] For example, the OIG for the CFTC noted that cost-benefit analysis was controlled by CFTC's legal staff rather than economists, and that "consideration of costs and benefits was being approached as a legal issue rather than an economic one." Office of the Inspector General, U.S. Commodity Futures Trading Commission, "A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act," June 13, 2011, http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf.

and agencies that promulgate fewer rules may not have a sufficient number of staff with the expertise to conduct extensive quantitative cost-benefit analysis.[50]

Analysis of Possible Extension of CBA Requirements to IRCs

The main argument in favor of extending E.O. 12866's CBA requirements to the IRCs is generally that such review would encourage agencies to produce higher-quality rules. Proponents have argued that through the executive orders establishing such review, Presidents have encouraged the executive branch agencies to consider more carefully the burdens associated with regulations; extending the requirements to the IRCs may bring those considerations to those agencies as well. A previously mentioned proposal in the 112th Congress, S. 3468, would authorize the President to extend CBA requirements through the issuance of an executive order.

Some advocates for extending the executive order's CBA requirements maintain that it may lead the agencies to produce higher quality rules. For example, former OIRA Administrator Sally Katzen has suggested that extending the requirements for CBAs to the IRCs and having OIRA review of those CBAs would provide incentives to agencies to produce high-quality analyses, since "nothing focuses the mind like knowing that someone will be reading" their analyses.[51] Susan Dudley, another former OIRA administrator, expressed disappointment in congressional testimony that President Obama has not extended the requirement for analytical requirements or OIRA review to the IRCs. Among the reasons she identified for this concern was that most financial regulations, including regulations issued by the new Consumer Financial Protection Bureau, will not be "constrained by the sound principles and procedures outlined by the President."[52] Indeed, many of the regulations that have been and will be issued pursuant to the Dodd-Frank Act will be issued by IRCs.[53]

It is not entirely clear how and whether extending E.O. 12866's CBA requirements to the IRCs would change their current practices, given that many of the IRCs already have statutory requirements for various forms of CBA, even if they are not subject to E.O. 12866. To the extent that the agencies are already fulfilling statutory requirements for CBA, extending the E.O.'s requirements may create duplicative requirements for some of those agencies. The following

[50] Having sufficient staff with the expertise to conduct extensive quantitative cost-benefit analysis may also be an issue for agencies currently subject to E.O. 12866 and Circular A-4.

[51] Testimony of Sally Katzen, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *Cost Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits*, 112th Cong., 1st sess., May 4, 2011, p. 7, http://judiciary.house.gov/hearings/pdf/Katzen05042011.pdf.

[52] Testimony of Susan E. Dudley, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *The APA at 65- Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?*, 112th Cong., 1st sess., February 8, 2011, p. 17, http://judiciary.house.gov/hearings/pdf/Dudley02282011.pdf.

[53] For further information about the agencies responsible for implementing the Dodd-Frank Act, see CRS Report R41472, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, by Curtis W. Copeland. In a November 2011 report, GAO observed that regulations issued pursuant to the Dodd-Frank Act could be improved if agencies performed more rigorous analyses that fully incorporated the guidance in OMB's Circular A-4, despite the fact that they are not required to do so. U.S. Government Accountability Office, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination*, GAO-12-151, November 2011, http://www.gao.gov/assets/590/586210.pdf.

section of this report examines more closely the potential effects of extending CBA requirements to the IRCs.

Potential Effects of Extending CBA Requirements to IRCs

If enacted, S. 3468 would authorize the President to extend, through executive order, the requirements for CBA that are currently found in E.O. 12866.[54] The potential effects that this change may have on the CBAs conducted by each IRC would vary depending on (1) the agency's current analytical practices, (2) the agency's mandatory and discretionary rulemaking responsibilities, (3) the number of "significant" and "economically significant" rules the agency issues each year, and (4) the agency's analytical resources, such as the technical expertise of staff who are responsible for conducting their cost-benefit analysis.

The effects of S. 3468 may be minimal for IRCs that currently have cost-benefit analysis procedures similar to those of E.O. 12866 and Circular A-4. For example, a 2011 report by the Office of the Inspector General (OIG) of the SEC stated that "the Commission's current rulemaking procedures are closely aligned with the requirements of E.O. 12866, E.O. 13563, and OMB Circular A-4."[55] The OIG noted that the analysis conducted by the SEC did not always consider the costs and benefits of regulatory alternatives, but the SEC sought comments on the costs and benefits of alternatives to their proposed rules whenever possible.[56]

Similarly, the report by the OIG of the OCC noted that, prior to adoption of the Dodd-Frank Act, the OCC had been part of the Treasury Department and had been subject to E.O. 12866 as well as other OMB guidance. According to the OIG, "accordingly, the requirements for economic analysis defined in OCC's rulemaking guide generally mirror those of EO 12866 and OMB Circular A-4."[57] For IRCs with current analytical practices similar to those of E.O. 12866 and Circular A-4, the additional requirements that could be imposed under S. 3468 may already be met by the analyses they are currently conducting.

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[54] As discussed later in this report, Presidents have been reluctant to extend CBA requirements and OIRA review to the IRCs, largely for political reasons and out of deference to Congress. Administrative law scholars have suggested that if Congress were to authorize such an extension, concerns about its appropriateness would be ameliorated (see section entitled "Analysis of Possible Extension of OIRA Review to IRCs"). An alternative approach would be for Congress to enact a statute requiring IRCs to comply with the E.O.'s requirements for cost-benefit analysis, or even creating a requirement in statute without tying the requirement for the executive order, rather than authorizing the President to extend the current requirements through an executive order.

[55] Office of the Inspector General, U.S. Securities and Exchange Commission, "Report of Review of Economic Analyses Performed by the Securities and Exchange Commission in Connection with Dodd-Frank Rulemakings," June 13, 2011, http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf. The report from the OIG of the SEC, along with reports from the OIGs of the CFTC, FDIC, OCC, and Federal Reserve, were completed in response to a request from the 10 Republican Senators on the Senate Committee on Banking, Housing, and Urban Affairs. On May 4, 2011, the Senators jointly requested that the OIGs provide them with information about the analytical requirements applicable to rulemaking in those five agencies. Each agency was asked to describe "any additional steps that the agency would have to take if it were subject to Executive Orders 13563 and 12866 and associated Office of Management and Budget guidance [Circular A-4]." See http://crapo.senate.gov/documents/RepublicanBankingCommitteeDoddFrankLetter.pdf for a copy of this letter.

[56] Ibid. In addition, the SEC-OIG noted that the analysis conducted by the SEC is not always quantitative, and recommended that a larger portion of cost-benefit analysis should be conducted by the SEC's Division of Risk, Strategy, and Financial Innovation (RiskFin, or RSFI), who have the skills in econometrics and other expertise needed to perform quantitative cost-benefit analysis.

[57] Office of the Inspector General, Department of the Treasury, "Dodd-Frank Act: Congressional Request for Information Regarding Economic Analysis by OCC," June 13, 2011, http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA-11-006.pdf.

For agencies whose current procedures are less rigorous than those of E.O. 12866 and Circular A-4, the effects of S. 3468 may depend on the other three factors listed above.[58] For example, an independent agency with fewer mandatory or discretionary rulemaking responsibilities that issues relatively fewer "significant" rules each year may find the additional requirements of S. 3468 minimally burdensome, even if their current cost-benefit practices are less rigorous. Those agencies may also find that their current staff and other analytical resources will remain adequate, even if they are subject to the executive order and OMB guidance.

Conversely, the additional cost-benefit requirements may be more burdensome for agencies with relatively greater regulatory responsibilities and for agencies with recently expanded regulatory responsibilities. These agencies may not have the staff with the technical expertise necessary to conduct cost-benefit analysis that is more extensive than their current requirements. For example, in light of the increased regulatory responsibilities some IRCs face pursuant to the Dodd-Frank Act, some have suggested that IRCs should consult OIRA when conducting cost-benefit analyses. In May 2012, Commissioner O'Malia announced that the CFTC had recently signed a Memorandum of Understanding with OIRA to obtain technical expertise when conducting regulatory analyses of rules it plans to issue pursuant to the Dodd-Frank Act.[59]

The potential effects of S. 3468 may also be mitigated for IRCs whose rulemaking activities would be exempt from some or all of the requirements of E.O. 12866. Under E.O. 12866, agencies are exempt from certain analytical requirements if (1) measures of costs and benefits are difficult to quantify or monetize,[60] (2) the rule is being promulgated under an emergency situation, or (3) the agency is under a statutory or judicially imposed deadline that makes full compliance with the executive order impossible. For example, the report from the OIG of the Board of Governors of the Federal Reserve noted that the executive orders provide agencies with exemptions to the cost-benefit analysis requirements in "emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow." The report did not specifically state whether, or how often, the Federal Reserve might qualify for such exemptions.[61]

[58] For example, the OIG reports for the CFTC and the FDIC both note that the agencies have internal guidance that encourage, but do not require, analytical practices similar in spirit to those in E.O. 12866 and Circular A-4. See Inspector General, U.S. Commodity Futures Trading Commission, "A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act," June 13, 2011, http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf and Office of the Inspector General, Federal Deposit Insurance Corporation, "Evaluation of the FDIC's Economic Analysis of Three Rulemakings to Implement Provisions of the Dodd-Frank Act," Report No. EVAL-11-003, June 2011, p. 1 of the Executive Summary, http://www.fdicoig.gov/reports11%5C11-003EV.pdf.

[59] See Scott D. O'Malia, CFTC Commissioner, "Smart Regulatory Reform and the Perils of High-Frequency Regulation," remarks at Outlook for ITC Markets event, May 31, 2012, http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-14.

[60] IRCs have cited their inability to quantify costs or benefits as a reason for not conducting full cost-benefit analysis. For example, see the GAO Major Rule Reports for two rules issued by the CFTC, "Core Principles and Other Requirements for Designated Contract Markets" and "Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management" at http://gao.gov/assets/600/592157.pdf and http://gao.gov/assets/600/590519.pdf, respectively. It is unclear under what circumstances IRCs may be exempt from CBA due to the difficulty of quantifying costs and/or benefits.

[61] Office of the Inspector General, Board of Governors of the Federal Reserve System, "Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings," June 13, 2011, p. 6, http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf. It is also important to note that under Section 2 of S. 3468, as introduced, expanded cost-benefit analysis would not apply to "a rule of the Board of Governors of the Federal Reserve System or the Federal Open Market Committee relating to monetary policy."

The Debate Over Cost-Benefit Analysis

In addition to the debate over the appropriate role for the use of cost-benefit analysis in the IRCs, a broader debate over the value of CBA has also taken place over the past several decades.

On one hand, former OIRA Administrator Cass Sunstein, an administrative law professor, has been a strong advocate of CBA, and he has written many articles and books examining its rise and defending its use. In his book *The Cost-Benefit State: The Future of Regulatory Protection,* written prior to his tenure at OIRA, Sunstein examined the increase in use and requirements for CBA, arguing that the use of CBA can lead to a much stronger regulatory system and better regulations in general. Throughout the book, Sunstein made many arguments in favor of the use of CBA. For example, he suggested that CBA can be used not only to ensure that the benefits of regulation justify the costs and that "government action is worthwhile," but that it can serve as a check against interest group influence over regulations. Interest groups, according to Sunstein, are capable of "fending off desirable regulation or pressing for regulation when the argument on its behalf is fragile. Here CBA, taken as an input into decisions, can protect democratic processes by exposing an account of consequences to public view."[62]

Similarly, some economists and others have argued that CBA "can be a powerful tool in informing regulatory decisions. Regulation uses a sizable amount of resources, so it is relevant to ask whether the benefits of regulation are worth the costs" and that "centralized oversight can help with interagency coordination, setting priorities, and implementing most cost-effective regulation."[63]

On the other hand, some have argued that the use of CBA does not necessarily improve agencies' regulatory decisions. For example, one scholar testified before the House Judiciary Committee in 2011 that

> cost-benefit analysis is itself a flawed technique for distinguishing between useful and counterproductive regulations … the existing regulatory process already allows those affected by regulations to identify flaws in agency regulatory proposals and affords both regulated entities and agencies opportunities to fix problems such as overly costly or unfair regulation.[64]

The witness stated further that while estimates of costs and benefits can be useful in regulatory decision making, such estimates are full of uncertainty and should not be the sole basis for determining regulatory outcomes. He suggested that agencies can use comment periods, as enforced by the courts under the Administrative Procedure Act, to obtain information and identify the best regulatory alternatives.

Additionally, CBA requirements may have the potential to slow down rulemaking, which may at times be contrary to the public interest. For example, the SEC has come under criticism recently because the pace of issuing rules appears to have slowed, particularly rules that are required

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[62] Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002), pp. 6-10. On the other hand, some have argued that OIRA, which currently reviews most agencies' CBAs, may act as a conduit for industry interests; this concern is discussed later in the report in the section on OIRA review.

[63] Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?" *Journal of Economic Perspectives*, vol. 22, no. 1 (Winter 2008), p. 68.

[64] Testimony of Robert L. Glicksman, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *Raising the Agency's Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need*, 112th Cong., 1st sess., March 29, 2011, pp. 2-3, available at http://judiciary.house.gov/hearings/pdf/Glicksman03292011.pdf.

pursuant to the Dodd-Frank Act.[65] One reason cited for the slow pace of rules is that the SEC was attempting to fulfill its statutory requirements for CBA, particularly after a court recently struck down one of the Dodd-Frank Act's rules for having an inadequate analysis in the *Business Roundtable* case mentioned earlier. A related hesitation about the use of CBA is that adding further requirements to a rulemaking process that is viewed by some as already too burdensome and time-consuming could put an unnecessary strain on agencies to meet statutory and/or judicial deadlines and other requirements.

Another concern that has been raised over the use of CBA is that it may be more difficult to estimate costs and benefits stemming from certain types of rules—particularly for those in which costs and/or benefits may be difficult to quantify or monetize. This criticism has often been voiced in response to proposals that would require banking agencies to measure costs and benefits, where the potential benefits involve things such as lowering financial risk or reducing fraud in securities markets. In addition, one recently issued report stated that costs tend to be easier to monetize than benefits, especially when dealing with market risk, which may cause costs to be overestimated in general.[66]

In the early 1990s, administrative law scholars began to write about the "ossification" of the rulemaking process.[67] The argument behind the "ossification" thesis states that agencies are subject to so many requirements in the rulemaking process that they generally take longer to issue rules and may require more resources to do so, resulting in uncertainty for the agency or agencies involved and for the regulated industry. One unintended consequence is that as the number of rulemaking requirements increases, agencies may have more incentive to seek out other vehicles for policy implementation, such as through the issuance of guidance documents and other less formalized means of executing policy changes. Proponents of the ossification thesis may argue that if Congress or the President institutes additional CBA requirements for the IRCs, those agencies may attempt to find other less participatory and transparent means for implementing policy. In other words, the ossification of rulemaking can incentivize agencies to preserve their resources by avoiding the rulemaking process and instead taking other administrative actions, such as the issuance of guidance documents and non-legislative rules.

On the other hand, President George W. Bush's OIRA Administrator John Graham testified before Congress that his experience and a review of the literature demonstrates that the ossification theory may be exaggerated, and that agencies continue to issue regulations in a timely manner, despite the numerous procedural and judicial requirements.[68] Some academic studies have also called into question the ossification thesis. One study, for example, found that there was little evidence that additional procedural requirements cause substantial delay in rulemaking.[69]

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[65] Jesse Hamilton, "Dodd-Frank Rules Slow at SEC After Cost Challenge," *Bloomberg*, March 6, 2012, http://www.bloomberg.com/news/2012-03-06/dodd-frank-rules-slow-at-sec-after-court-cost-benefit-challenge.html.

[66] Dennis Kelleher, Stephen Hall, and Katelynn Bradley, *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC*, Better Markets, Inc., July 30, 2012.

[67] For two main proponents of the ossification thesis, see Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal*, vol. 41, no. 6 (June 1992), pp. 1385-1462; and Richard J. Pierce, Jr., "Seven Ways to Deossify Agency Rulemaking," *Administrative Law Review*, vol. 47, no. 1 (Winter 1995), pp. 59-98.

[68] Testimony of John D. Graham, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits*, 112th Cong., 1st sess., May 4, 2011, p. 4, http://judiciary.house.gov/hearings/pdf/Graham05042011.pdf.

[69] Jason Webb Yackee and Susan Webb Yackee, "Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making 'Ossified'?" *Journal of Public Administration Research and Theory*, vol. 20 (2010), pp. 261-282.

OIRA Review of Regulations Under Executive Order 12866

The second major requirement of E.O. 12866, in addition to the requirement for agencies to conduct CBAs for "economically significant" rules, is centralized OIRA review of regulations. Under the order, agencies are required to submit proposed and final "significant" regulations to OIRA, at which time OIRA has up to 90 days to complete its review.[70]

During the review process, OIRA examines each regulation to ensure that the agency followed the principles and procedures outlined in E.O. 12866, including the applicable requirements for conducting CBA, and that the regulation is consistent with the policy preferences of the President. As former OIRA Administrator nominee James Blumstein discussed in an article on centralized regulatory review, E.O. 12866 made very clear that one of its main objectives was to make agency regulations consistent with presidential policy. According to Blumstein, this was illustrated by the frequent usage of the phrase "the President's priorities," which appears ten times in the order.[71]

E.O. 12866's requirements for OIRA review of "significant" regulations supplanted and somewhat scaled back the requirements of President Reagan's E.O. 12291, which required that agencies submit *all* proposed and final rules to OIRA for review. Since President Reagan issued E.O. 12291, scholars of the administrative process have expressed both support for and concern over OIRA's role, and by extension, the role of the President, in the rulemaking process. Some of this discussion, especially in recent years, has focused on the issue of whether rules by the IRCs should be subjected to OIRA review. S. 3468 would authorize the President to extend the requirements for OIRA review to the IRCs.

Analysis of Possible Extension of OIRA Review to IRCs

Many administrative law scholars and other observers of the rulemaking process have expressed support for OIRA review, and some have spoken directly in support of extending the requirement for review to the IRCs. Much of this support for OIRA review relies on the underlying premise that increased presidential control, through OIRA review, of rulemaking could improve the both rulemaking process within agencies and the quality of the regulations themselves.

Sally Katzen has suggested that centralized review of regulations "facilitat[es] political accountability (the President takes the credit and gets the blame for what his agencies decide)" and can "enhance regulatory efficacy (that is, decisions that take into account the multitude of disciplines and the multitude of perspectives that can and should be brought to bear in solving problems in our complex and interdependent society)."[72] Others have suggested that the White

[70] The review process may be extended by the Director of OMB or at the request of the agency head (§6(b)(2)(C)).

[71] James F. Blumstein, "Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues," *Duke Law Journal*, vol. 51, no. 3 (December 2001), pp. 851-899. Blumstein was nominated by President George H.W. Bush to be OIRA Administrator but was not confirmed.

[72] Testimony of Sally Katzen, U.S. Congress, House Committee on Science and Technology, Subcommittee on Investigations and Oversight, *Amending Executive Order 12866: Good Governance of Regulatory Usurpation?*, 110th Cong., 1st sess., February 13, 2007, p. 5, http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/021307_katzen.pdf.

House is in a unique position to identify rules under development that may conflict with a rule or rules under development in another agency; centralized oversight may provide a mechanism for coordination between and among agencies.[73]

Some organizations have also expressed support for the extension of OIRA review to the IRCs. The Administrative Conference of the United States (ACUS) has supported presidential review of IRC rulemaking. In 1988, ACUS expressed its opinion that presidential review should apply generally to federal rulemaking: "As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies."[74]

The American Bar Association (ABA) has also endorsed extending presidential review to the IRCs. In 1990, the ABA House of Delegates adopted a recommendation endorsing ACUS's guidelines President Reagan's executive orders establishing presidential review of agency rulemaking. The resolution declared that "presidential review should apply generally to all informal federal rulemaking, including that by independent regulatory agencies."[75] In 2009, the Section of Administrative Law and Regulatory Practice of the ABA provided comments to OIRA regarding presidential supervision of agency rulemaking and declared that the "White House should extend Executive oversight to independent agencies."[76] In October 2011, the ABA also submitted comments on H.R. 3010, the Regulatory Accountability Act of 2011 (RAA). Various provisions of the RAA would have extended OIRA oversight to IRC rulemaking. The ABA declared that it "strongly support[s] this feature of the bill" and noted that it has "long favored extension of the oversight orders to independent agency rulemaking."[77]

While many administrative law scholars and other students of the regulatory process support the extension of some OIRA review of regulations to the IRCs, other individuals and organizations have expressed hesitation or opposition. Many of the criticisms echo those that arose immediately following the establishment of centralized OIRA review under President Reagan in 1981. The main concerns of critics of Reagan's initial decision to establish centralized OIRA review of regulations were two-fold. First, some critics felt that OIRA review was a mechanism through which President Reagan would institute a deregulatory agenda. However, that concern has largely receded, in part because every President since Reagan has continued the practice of OIRA review. Second, critics charged that Reagan was asserting too much power, potentially violating the U.S. Constitution's separation of powers doctrine by asserting too much control over executive agencies' regulations. That objection has also largely receded since the 1980s.[78]

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[73] Steven Croley, "White House Review of Agency Rulemaking: An Empirical Investigation," *University of Chicago Law Review*, vol. 70, no. 3 (Summer 2003), p. 830; and Richard H. Pildes and Cass R. Sunstein, "Reinventing the Regulatory State," *University of Chicago Law Review*, vol. 62, no. 1 (Winter 1995), pp. 28-33.

[74] 1 C.F.R. §305.88-9; ACUS, Recommendation 88-9, Presidential Review of Agency Rulemaking, December 8, 1988, http://www.acus.gov/wp-content/uploads/2011/10/88-9.pdf.

[75] ABA Recommendation and Report 302, adopted by the House of Delegates August 7-8, 1990, http://www.americanbar.org/content/dam/aba/directories/policy/1990_am_302.pdf.

[76] Memorandum from the Section of Administrative Law and Regulatory Practice of the ABA to OIRA, March 16, 2009, p. 7, http://thecre.com/pdf/20090326_ABANET_comments.pdf. However, these comments noted that certain rulemaking programs should remain insulated from review, such as the regulation of political campaigns, and that "presidential oversight may be inappropriate where 'political accountability would interfere with the successful performance of the [regulatory] function,' such as the functions performed by the Federal Reserve Board."

[77] Section of Administrative Law and Regulatory Practice, ABA, Comments on H.R. 3010, the Regulatory Accountability Act, October 24, 2011, pp. 18-19, http://www.americanbar.org/content/dam/aba/administrative/administrative_law/commentson3010_final_nocover.authcheckdam.pdf.

[78] For a summary and analysis of the controversy that arose in light of President Reagan's issuance of Executive Order

However, a similar concern has recently been raised over the possible extension of E.O. 12866's requirements to the IRCs, which have been considered at times to be quasi-legislative in function.[79] Because the IRCs generally possess elements of independence such as "for cause" removal protection for their commission members and agency heads, it has been widely interpreted that Congress intended to insulate the agencies from presidential control.

> Perhaps the most primary current concern about the possible extension of presidential review to the IRCs is that such a practice could compromise the independence of those agencies, and that it may give the President an inappropriate amount of power or influence over the rulemaking decisions of the IRCs. Because OIRA is part of OMB and is, by extension, an agent of the President, the concern is that subjecting regulations to OIRA review may politicize the rulemaking process. As explained by Katzen and others, "past presidents have been reluctant to extend OIRA's role to the IRCs out of deference to Congress."[80]

Sunstein has also written in strong support of presidential review of regulations. In one article, for example, Sunstein and administrative law scholar Peter Strauss argued that "time has not undermined the ABA's conclusion in *Roads to Reform* that greater presidential control over the regulatory process is desirable" and that there was a "growing professional consensus" on the matter.[81] Strauss and Sunstein identified three factors in support of OIRA review:

> First, the President is in a good position to centralize and coordinate the regulatory process…. Second, the President is electorally accountable…. Third, the President, by virtue of his accountability and capacity for centralization, is able to energize and direct regulatory policy in a way that would be impossible if that policy were to be set exclusively by administrative officials.[82]

Based upon those three premises, Strauss and Sunstein argued that OIRA review should be expanded to the IRCs:

> From the standpoint of sound regulatory policy, fashioned in a process of informal rulemaking, we believe that there is no meaningful difference between the "independent" agencies and those agencies to which the executive orders are currently applicable. The two categories of agencies engage in regulatory activities that are, from a functional standpoint, indistinguishable. Indeed, often those activities concern the same or similar subject areas; consider the overlapping work of the Department of Justice and the Federal Trade Commission in the area of antitrust. The same considerations that justify a coordinating presidential role with respect to "executive" agencies apply with full force to those characterized as "independent." For these reasons, we believe that Executive Orders 12291 and 12498 should be applied to the latter set of agencies.[83]

Were centralized OIRA review of regulations instituted, the question arises as to what the consequences of that review should be. Many scholars have offered suggestions as to how to

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12291, see Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291," *Michigan Law Review*, vol. 80, no. 2 (December 1981), pp. 193-247.

[79] See, for example, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in which the Supreme Court explained that some agencies were created by Congress to be quasi-legislative or quasi-judicial in function, by instituting "for cause" removal provisions, kept them independent of executive control.

[80] Katzen testimony, *Cost Justifying Regulations*, p. 8.

[81] See American Bar Association, Commission on Law and the Economy, *Federal Regulation: Roads to Reform*, Final Report, with Recommendations, 1979.

[82] Peter L. Strauss and Cass R. Sunstein, "The Role of the President and OMB in Informal Rulemaking," *Administrative Law Review*, vol. 38, no. 2 (Spring 1986), pp. 189-190.

[83] Ibid., p. 205.

extend the requirements and protect the independence of the agencies by limiting the ability of OIRA to stop an IRC from issuing a rule. For example, Katzen has said that presidential review should be extended to the IRCs, but it should be done cautiously:

> While the way the Executive Branch agencies and IRCs conduct rulemaking is for all practical purposes the same, the differences between the two types of agencies in terms of their structure and their relationship to the President suggests that the review process of the "enforcement" of any requirement for economic analysis should not—possibly, cannot—be the same without compromising the independence of the IRCs when they do not acquiesce in OIRA's assessment.[84]

In a 2002 article, two administrative law scholars suggested that while subjecting IRCs to OIRA review would be a beneficial change to the nation's regulatory system,

> None of this suggests that the President, or OIRA, should be permitted to displace the decisions of the independent regulatory agencies. But it does suggest that a supervisory rule, leaving the ultimate decision to those agencies, would be entirely acceptable. To those who are skeptical of this conclusion, it might make sense to create a special, weaker system of oversight for the independent agencies, limited to procedural matters (and hence allowing no room for return letters). But we think that it would be desirable to keep a single system in place for all agencies, retaining the idea that if an independent agency ultimately seeks to issue a regulation notwithstanding OIRA objection, it is entitled to do so.[85]

The establishment of limited OIRA oversight of agency CBAs, through means such as allowing non-binding feedback from OIRA that can only be advisory, may assuage some concerns, particularly if the authority is clearly delineated. This appears to be the approach taken by sponsors of S. 3468. If enacted, the bill would authorize the President to issue an executive order requiring IRCs to submit their rules to OIRA review. OIRA would have the opportunity to provide a non-binding statement assessing the agency's compliance with the relevant CBA requirements. The statement would be placed into the administrative record for the rule and could be reviewed by a court if the rule, once promulgated, were ever to be challenged. OIRA would not have the authority to stop an IRC from issuing a rule with which the President does not agree. Furthermore, the bill explicitly states that compliance or noncompliance with the executive order's requirements for CBA or OIRA review would not be subject to judicial review.

Another question that arises is whether it is appropriate for the President to assert a requirement for OIRA review, as the past several presidents have clearly been hesitant to do, or whether it would be more appropriate for Congress to institute centralized review. Katzen has suggested that while Presidents have been reluctant to extend OIRA's influence over the IRCs out of deference to Congress and over concerns about the independence of those agencies, congressional authorization of such an extension would "go a long way to ameliorate any concerns in that regard."[86] Through enacting a statutory requirement or authorization for OIRA review of rules and/or CBAs, Congress would be giving its explicit approval.[87]

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[84] Katzen testimony, *Cost Justifying Regulations*, p. 8.

[85] Robert W. Hahn and Cass R. Sunstein, "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis," *University of Pennsylvania Law Review*, vol. 150, no. 5 (May 2002), pp. 1535-1536.

[86] Testimony of Sally Katzen, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *Cost Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits*, 112th Cong., 1st sess., May 4, 2011, p. 8, http://judiciary.house.gov/hearings/pdf/Katzen05042011.pdf.

[87] This may explain why S. 3468 authorizes the President to issue an executive order containing requirements for CBA and centralized review, rather than creating a statutory requirement if enacted.

In a similar argument about the desirability for congressional authorization of the President to make such a change, one administrative law scholar said in testimony before Congress that

> Presidents have not brought the commissions fully into the tent of their executive orders, on my understanding, only because they fear that the political costs to their relationship with Congress would exceed the benefits of their doing so. In the Paperwork Reduction Act, Congress can be thought to have drawn that line. You can, and perhaps should, erase it.[88]

While the main criticism of the potential of subjecting IRCs to OIRA review is that the independence of the agencies could be compromised, other criticisms have been raised as well. A separate issue that has at times frustrated critics of OIRA review is that the OIRA review process may actually favor the interests of industry. Immediately after the issuance of E.O. 12291, critics expressed apprehension that OIRA review would serve as a "conduit" for private industry's interests.[89] Some studies and media reports have suggested that industry plays a significant role in the outcome of regulations.[90] The extension of that argument would suggest that OIRA could potentially serve as another access point for industry to influence rulemaking at the IRCs.

A final concern that has been raised over the idea of subjecting IRC rules to OIRA review is that OIRA may lack the technical expertise that is often considered to be a strength of regulatory agencies, and that increasing the number of regulations to come under OIRA's purview could put a strain on its resources.[91] Regulatory agencies have individuals who become subject matter experts in very narrow areas in which they regulate. Given the size and scope of OIRA's responsibilities, officials at OIRA tend to be issue generalists, not necessarily specialists.[92] On the other hand, OIRA may not have substantive expertise in a particular regulatory field, but its general understanding and focus on regulations makes employees at OIRA properly suited to distinguish between regulations that "may lead to unintended and undesirable consequences."[93]

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[88] Testimony of Peter L. Strauss, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial, and Administrative Law, *The APA at 65- Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?*, 112th Cong., 1st sess., February 28, 2011, p. 6, http://judiciary.house.gov/hearings/pdf/Strauss02282011.pdf. Under the PRA, agencies (including IRCs) are required to seek OMB's approval of any information collection from 10 or more nonfederal persons. However, if OMB denies an information collection request from an IRC, the denial can be overturned by a majority vote of the commission's members. In that way, the PRA therefore provides limited oversight to OMB of information collections, but OMB cannot prevent one of those agencies from proceeding with such a collection.

[89] Rosenberg, "Executive Power," p. 195.

[90] See, for example, Bagley and Revesz, "Centralized Oversight," and Erik D. Olson, "The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291," *Virginia Journal of Natural Resources Law*, vol. 4, no. 1 (Fall 1984), pp. 1-80.

[91] A *Washington Post* article reported that OIRA's size has reduced by half over the three decades it has existed, from 90 employees to about 45, and that former OIRA officials have recommended that the agency acquire more staff. Andrew Zajac, "Regulators Surge in Numbers While Overseers Shrink," *Washington Post*, June 24, 2012.

[92] Testimony of David C. Vladeck, U.S. Congress, House Committee on Science and Technology, Subcommittee on Investigations and Oversight, *Amending Executive Order 12866: Good Governance of Regulatory Usurpation?*, 110th Cong., 1st sess., February 13, 2007, p. 4, http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/021307_vladeck.pdf. Also see *Public Citizen v. Mineta*, 340 F.3d 39 (2d Cir. 2003), and *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004).

[93] Croley, "White House Review," p. 830.

Additional Analysis of S. 3468

While S. 3468 would authorize the President to make the two changes discussed and analyzed above, there are additional points worth emphasizing.

The scope of the rules that could be covered by an executive order issued pursuant to S. 3468 is slightly different that the scope of what E.O. 12866 currently covers. The bill has a narrower definition for "significant" rules. The definition of "significant" in S. 3468 omits two categories that are included in the definition of "significant" in E.O. 12866. Those categories are rules that "materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;" or rules that "raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order." In other words, rules that fall into those categories that are issued by IRCs would not be authorized by S. 3468 to be subject to OIRA review.

However, the definition of "rule" in S. 3468 is broader than the definition of "rule" in E.O. 12866, and could possibly include some guidance documents. S. 3468 references the definition of a rule as defined in Section 551 of title 5 (the Administrative Procedure Act), rather than the definition used in 553, which is the section that defines "rule" for the purposes of notice and comment requirements.

Furthermore, as mentioned above, the bill clearly states that the compliance or noncompliance of an IRC with the requirements of an executive order issued pursuant to the bill could not be subject to judicial review. The potential consequences of what could occur if an IRC and OIRA disagree on the analysis or substance of a particular rule also are unclear.[94]

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[94] For a thorough discussion of potential enforcement actions could be taken against an IRC, including an analysis of whether the President would have the authority to remove agency officials over a disagreement in policy, see CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by Vivian S. Chu and Daniel T. Shedd, pp. 16-23.

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